

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

NOVELIS CORPORATION,	)	
	)	
Petitioner/Cross Respondent,	)	
	)	
JOHN TESORIERO, MICHAEL MALONE,	)	
RICHARD FARRANDS, AND ANDREW	)	
DUSCHEN,	)	Case No. 16-3076
	)	
Intervenors,	)	Case No. 16-3570
	)	
v.	)	
	)	
THE NATIONAL LABOR RELATIONS	)	
BOARD,	)	
	)	
Respondent/Cross Petitioner,	)	
	)	
UNITED STEEL, PAPER AND	)	
FORESTRY, RUBBER,	)	
MANUFACTURING, ENGERGY, ALLIED	)	
INDUSTRIAL AND SERVICE WORKERS	)	
INTERNATIONAL UNION, AFL-CIO,	)	
CLC,	)	
	)	
Intervenor.	)	

**REPLY OF INTERVENOR USW TO PETITIONER/CROSS-  
RESPONDENT NOVELIS CORPORATION’S RESPONSE TO  
INTERVENOR USW’S MOTION REQUESTING JUDICIAL NOTICE**

Pursuant to Federal Rule of Appellate Procedure 27 and Local Rule 27.1,  
Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy,  
Allied Industrial & Service Workers International Union, AFL-CIO, CLC, “USW”,  
files this Reply to Petitioner/Cross-Respondent’s Novelis Corporation’s Response  
To Intervenor USW’s Motion Requesting Judicial Notice and shows as follows:

1. At 2:18 p.m. on March 30, 2017, Richard Brean, counsel for USW, sent the e-mail below to counsel for the parties:

“All,

Attached please find Intervenor USW’s Motion Requesting Judicial Notice and supporting Declaration of Kenneth Wagner, which USW intends to file in the Second Circuit. Pursuant to Local Rule 27.1, I am writing to request that you reply to me on behalf of the party which you represent as to whether that party opposes, does not oppose, or does not know whether it opposes, the granting of this Motion. Also, please inform me whether the party you represent intends to file a response.

Thank you,

Rich Brean” (Brean Declaration, ¶ 2, Ex. A).

3. At 1:04 p.m. on March 31, 2017, Robert Dumbacher, counsel for Novelis Corporation, “Novelis”, sent the e-mail below to Mr. Brean:

“Mr. Brean– Thank you for the email. Novelis opposes the USW’s Motion. The fact that the USW has chosen to file an unfair labor practice charge related to Mr. Wyman’s termination for causing a serious accident while violating numerous safety protocols is not relevant to these proceedings, and consideration by the Second Circuit of this fact would be inappropriate for several reasons, including that it would violate Novelis’ due process rights. To the extent the USW files the attached motion, Novelis will file an opposition. Thank you.” (*Id.*)

4. At 2:00 p.m. on March 31, 2017, Mr. Brean sent the e-mail below to Mr. Dumbacher:

“Mr. Dumbacher- You are misreading our motion. We are not contending that the mere filing of the charge is itself evidence of recurrence of violations on the part of Novelis, and we were

Careful to note that the charge contained allegations, that the Region had not made a determination on the merits, and that we would notify the Circuit as to any such future determination. In turn, I am happy to include a footnote in our brief to this effect. The sole reason I plan to file this motion is to alert the parties and the court to this potential issue and preserve the point to permit supplemental briefing since it is unlikely the Region will make a decision as to whether complaint should issue before the due date of the USW's brief. Does this explanation change your response to this motion?

Rich Brean" (*Id.*)

5. Neither Mr. Dumbacher nor any other counsel representing Novelis replied to Mr. Brean's March 31, 2017, 2:00 p.m. e-mail. (Brean Declaration, ¶ 3.)

6. On April 13, 2017, Novelis filed a Response opposing USW's Motion Requesting Judicial Notice. Much of the Response is irrelevant to the deciding of USW's Motion and contains Novelis' arguments that: (1) the unfair labor practice charge filed by USW in Case 03-CA-193649 lacks merit, (2) pursuant to its understanding of the law, the Motion is inconsistent with one of the arguments in the Board's Brief, and (3) the granting of USW's Motion would actually strengthen Novelis' case before this Court. (See: Novelis' Response at 2-3, 6). The relevant portion of Novelis' Response contends that USW has filed its Motion to prove a recurrence of the commission of ULPs on the part of Novelis and that courts have held that an allegation in an administrative charge is not proof that the allegation is true. (See: *id.* at 3-5). The gist of this claim is set out in this sentence of the Response, "In essence, the USW is asking the Court to take judicial notice of a

mere allegation, which it intends to argue is evidence of a recurring violation.”

(See *id.* at 3).

7. In footnote 33 on page 48 of its Brief, which was filed on April 14, 2017, and is set forth in full below, USW, consistent with the contents of Mr. Brean’s March 31 e-mail to Mr. Dumbacher, explained that it was not seeking judicial notice of the filing of the charge in order to argue that its filing “was evidence of a recurring violation”:

“Presently pending before this Court is Intervenor USW’s Motion Requesting Judicial Notice of the filing of the ULP charge on February 28, 2017 in Case Number 03-CA-193648 alleging in relevant part that Novelis unlawfully discharged USW adherent Brian Wyman on January 12, 2017. Judicial notice is sought for the fact of its filing not for the truth of the allegations contained in the charge. The filing of the charge, which is still under investigation by the NLRB, is not proof as to the likelihood of recurrence of ULPs by Novelis. It is anticipated that the Board will make its decision as to whether the charge has merit only after the briefing in these cases has been completed, and USW has filed its Motion solely to preserve this point for supplemental briefing in the event that the Board finds merit in the charge and issues a complaint.”

8. The limited purpose for which judicial notice is sought is a proper one, and USW’s Motion Seeking Judicial Notice should be granted.

Respectfully submitted,

Dated: April 17, 2017

s/ Daniel M. Kovalik

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*Counsel for Intervenor United Steel, Paper  
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Energy, Allied Industrial and Service  
Workers International Union, AFL-CIO,  
CLC*

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INTERNATIONAL UNION, AFL-CIO,	)	
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**DECLARATION OF RICHARD J. BREAN  
IN SUPPORT OF REPLY OF INTERVENOR USW TO  
PETITIONER/CROS-RESPONDENT NOVELIS CORPORATION'S  
RESPONSE TO INTERVENOR USW'S  
MOTION REQUESTING JUDICIAL NOTICE**

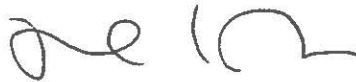
1. I am General Counsel of Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service International Union, AFL-CIO, CLC ("USW") and am one of the attorneys representing USW in this case.

2. Attached hereto as Exhibit A is an e-mail thread containing three e-mails that I exchanged with Robert Dumbacher, Counsel for Novelis, on March 30 and March 31, 2017.

3. Neither Mr. Dumbacher nor any other counsel representing Novelis Corporation replied to the e-mail I sent to Mr. Dumbacher at 2:00 p.m. on March 31, 2017.

**Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.**

**Executed this 17<sup>th</sup> day of APRIL, 2017.**

A handwritten signature in black ink, appearing to read "Richard J. Brean", is written above a horizontal line.

RICHARD J. BREAN



**Brean, Rich**

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**From:** Brean, Rich  
**Sent:** Friday, March 31, 2017 2:00 PM  
**To:** 'Dumbacher, Robert'  
**Subject:** RE: Intervenor USW's Motion Requesting Judicial Notice

Mr. Dumbacher- You are misreading our motion. We are not contending that the mere filing of the charge is itself evidence of recurrence of violations on the part of Novelis, and we were careful to note that the charge contained allegations, that the Region had not made a determination on the merits, and that we would notify the Circuit as to any such future determination. In turn, I am happy to include a footnote in our brief to this effect. The sole reason I plan to file this motion is to alert the parties and the court to this potential issue and preserve the point to permit supplemental briefing since it is unlikely the Region will make a decision as to whether complaint should issue before the due date of the USW's brief. Does this explanation change your response to this motion?

Rich Brean

---

**From:** Dumbacher, Robert [<mailto:RDumbacher@hunton.com>]  
**Sent:** Friday, March 31, 2017 1:04 PM  
**To:** Brean, Rich  
**Cc:** Powell, Kurtis; Ken Dobkin ([ken.dobkin@novelis.adityabirla.com](mailto:ken.dobkin@novelis.adityabirla.com))  
**Subject:** RE: Intervenor USW's Motion Requesting Judicial Notice

Mr. Brean- Thank you for the email. Novelis opposes the USW's Motion. The fact that the USW has chosen to file an unfair labor practice charge related to Mr. Wyman's termination for causing a serious accident while violating numerous safety protocols is not relevant to these proceedings, and consideration by the Second Circuit of this fact would be inappropriate for several reasons, including that it would violate Novelis's due process rights. To the extent the USW files the attached motion, Novelis will file an opposition. Thank you.

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**From:** Brean, Rich [<mailto:rbrean@usw.org>]  
**Sent:** Thursday, March 30, 2017 2:18 PM  
**To:** Powell, Kurtis; Dumbacher, Robert; Kenneth Dobkin ([ken.dobkin@novelis.adityabirla.com](mailto:ken.dobkin@novelis.adityabirla.com)); Thomas Eron ([teron@bsk.com](mailto:teron@bsk.com)); Linda Dreeben ([Linda.Dreeben@nlrb.gov](mailto:Linda.Dreeben@nlrb.gov)); Kellie Isbell  
**Subject:** Intervenor USW's Motion Requesting Judicial Notice  
**Importance:** High

All:

Attached please find Intervenor USW's Motion Requesting Judicial Notice and supporting Declaration of Kenneth Wagner, which USW intends to file in the Second Circuit. Pursuant to Local Rule 27.1, I am writing to request that you reply to me on behalf of the party which you represent as to whether that party opposes, does not oppose, or does not know whether it opposes, the granting of this Motion. Also, please inform me whether the party you represent intends to file a response.

Thank you,

Rich Brean





**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I electronically filed the foregoing Reply Of Intervenor USW To Petitioner/Cross-Respondent Novelis Corporations' Response To Intervenor USW's Motion Requesting Judicial Notice and Declaration Of Richard J. Brean In Support Of Reply Of Intervenor USW To Petitioner/Cross-Respondent Novelis Corporation's Response To Intervenor USW's Motion Requesting Judicial Notice with the Second Circuit Court of Appeals NextGen CM/ECF filing system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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John Tesoriero, Michael  
Malone, Richard Farrands &  
Andrew Duschen)*

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*(Counsel for Respondent - Cross  
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Relations Board)*

April 17, 2017

s/ Daniel M. Kovalik

Daniel M. Kovalik